

§ 701.26 Exemption (b)(4).

Those containing trade secrets or commercial or financial information that a naval activity receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information, impair the government's ability to obtain necessary information in the future, or impair some other legitimate government interest. Examples include:

(a) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged such as trade secrets, inventions and discoveries, or other proprietary data.

(b) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(c) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(d) Financial data provided in confidence by private employers in connection with local wage surveys used to fix and adjust pay schedules applicable to the prevailing wage rate for employees within the Department of the Navy.

(e) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(f) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, or developed in part with federal funds and in part at private expense, where the contractor or subcontractor retains a legitimate proprietary interest in the

data under 10 U.S.C. 2320-2321 and DOD Federal Acquisition Regulation Supplement (DFARS), subpart 27.4. Technical data developed exclusively with federal funds may be withheld under exemption (b)(3) if it meets the criteria of 10 U.S.C. 130.

(g) Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

Note: The status of unit prices in awarded in government contracts, once a controversial issue, has become more settled with recent court decisions. The courts have held that disclosure of unit prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, and that the possibility of competitive harm was thus too speculative.

§ 701.27 Exemption (b)(5).

Those records containing internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether between agencies or between Department of Defense and Department of the Navy components, except as provided in § 701.27 number (b) through (e). Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

(a) Examples include:

(1) Nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions, or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of Department of the Navy individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups formed for the purpose of obtaining advice and recommendations.

(3) Nonfactual portions of evaluations by Department of the Navy personnel of contractors and their products.